DEPARTMENT OF STATE REVENUE

03-20181133.SLOF

Supplemental Letter of Findings: 03-20181133
Withholding Tax
For The Tax Years 2014-2016

NOTICE: IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Supplemental Letter of Findings.

HOLDING

Employer failed to provide any valid reason to explain why it did not withhold state and county income taxes from its employees' wages. Therefore, the Department's initial assessment was correct.

ISSUE

I. Withholding Tax–Imposition.

Authority: IC § 6-8.1-5-1; IC § 6-3-4-8; *Vinup v. Joe's Constr., LLC*, 64 N.E.3d 885 (Ind. Ct. App. 2016); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); 45 IAC § 3.1-1-97.

Taxpayer protests proposed assessments of state and county withholding tax on wages it paid to its employees.

STATEMENT OF FACTS

Taxpayer is an Indiana business. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer did not withhold state or county withholding tax from its employees' wages for the tax years 2014, 2015, and 2016 ("Tax Years"). The Department therefore issued proposed assessments for state and county withholding tax, penalties, and interest for those years. Taxpayer protested the proposed assessments. Taxpayer did not appear at the scheduled hearing. Therefore, the Department considered the protest withdrawn, as provided by Department policy. Taxpayer then requested and was granted a rehearing. An administrative rehearing was held and this Supplemental Letter of Findings results. Further facts will be supplied as required.

I. Withholding Tax–Imposition.

DISCUSSION

Taxpayer protests the assessment of state and county withholding taxes on wages it paid to its employees for the Tax Years. Taxpayer had treated the workers as independent contractors. In its audit report, the Department detailed why the individuals in question were employees and not independent contractors. Taxpayer states that it does not now dispute that the individuals were indeed employees. Taxpayer states that it should not be liable for the withholding tax because it relied on erroneous information from a third party regarding the withholding tax. Specifically, Taxpayer states that the third party told it to treat its workers as independent contractors rather than as employees. Taxpayer provided 1099 MISC forms to the individuals.

As a threshold issue, it is the taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

An employee is a person "'employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control,' while an independent contractor generally controls the method and details of the task and answers to the principal only as to the results." *Vinup v. Joe's Constr., LLC*, 64 N.E.3d 885, 891 (Ind. Ct. App. 2016).

Since the audit determined that the workers were employees, the relevant regulation, 45 IAC 3.1-1-97, states that employers must "withhold [F]ederal taxes pursuant to the Internal Revenue Code," and are also "required to withhold from employees' wages Adjusted Gross and County Adjusted Gross Income Tax."

Taxpayer concedes that its workers are employees and that it is required to adhere to Indiana's withholding tax. Taxpayer maintains that although it did not meet its responsibility to withhold the tax, the Department should waive Taxpayer's failure to withhold state and county income tax because Taxpayer erroneously relied on third-party advice and did not understand the requirements of the withholding tax law.

IC § 6-3-4-8 provides, in part, as follows:

> (a) Except as provided in subsection (d), *every employer making payments of wages subject to tax under this article, regardless of the place where such payment is made, who is required under the provisions of the Internal Revenue Code to withhold, collect, and pay over income tax on wages paid by such employer to such employee, shall, at the time of payment of such wages, deduct and retain therefrom the amount prescribed in withholding instructions issued by the department.* The department shall base its withholding instructions on the adjusted gross income tax rate for persons, on the total rates of any income taxes that the taxpayer is subject to under IC 6-3.5, and on the total amount of exclusions the taxpayer is entitled to under IC 6-3-1-3.5(a)(3) and IC 6-3-1-3.5(a)(4). However, the withholding instructions on the adjusted gross income of a nonresident alien (as defined in Section 7701 of the Internal Revenue Code) are to be based on applying not more than one (1) withholding exclusion, regardless of the total number of exclusions that IC 6-3-1-3.5(a)(3) and IC 6-3-1-3.5(a)(4) permit the taxpayer to apply on the taxpayer's final return for the taxable year. Such employer making payments of any wages:
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> *(1) shall be liable to the state of Indiana for the payment of the tax required to be deducted and withheld under this section and shall not be liable to any individual for the amount deducted from the individual's wages and paid over in compliance or intended compliance with this section*; and
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> (2) shall make return of and payment to the department monthly of the amount of tax which under this article and IC 6-3.6 the employer is required to withhold.
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> (*Emphasis added*).

Accordingly, IC § 6-3-4-8(a) specifically requires an employer to "withhold, collect, and pay over income tax on wages paid by such employer to such employee . . . [in] the amount prescribed in withholding instructions issued by the department." IC § 6-3-4-8(a)(1) specifically provides that the employer is "liable to the state of Indiana for the payment of the tax required to be deducted and withheld." (*Emphasis added*).

In conclusion, Taxpayer's reliance on erroneous third-party advice does not absolve it of its statutory duty to withhold state and county income tax. Taxpayer has provided no statute, regulation, or court case supporting its argument that it should not be held liable for the withholding taxes at issue.

FINDING

Taxpayer's protest is denied.

June 25, 2018

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An html version of this document.